United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1221

ORIGINAL

To be argued by
THOMAS J. O'BRIEN

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

CARLOS ALBERTO MUNOZ and LOUIS CARDINAS,

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR APPELLANT MUNOZ

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

-v-

CARLOS ALBERTO MUNOZ and
LOUIS CARDENAS,

Defendants-Appellants.

PRELIMINARY STATEMENT

The defendants were charged under a one count indictment, 76 CR 131, with conspiracy to import, possess and distribute cocaine in violation Title 21 U.S.C. §846 and §963. The defendant Munoz was found guilty by a jury after a trial conducted before the Honorable Thomas C. Platt.

On May 14, 1976, the defendant was sentenced to 18 months imprisonment and a special parole term of 15 years with a provision that he leave the United States and not return during the special parole term.

This is an appeal from that judgment of conviction.

STATEMENT OF FACTS

On February 10, 1976, Jorge Alberto Guerrero Puello ("Mr. Guerrero"), a seaman, was arrested for importing cocaine as he was leaving his ship which had recently arrived from Columbia. (TR 163-170)*. After his arrest, he agreed to cooperate with the government and to make a "controlled delivery" of the cocaine. He told the arresting officers that his instructions were to go to Borough Hall and wait for a man with a yellow paper. If noone arrived, he was to telephone 429-0585(1), in the event of no answer, to proceed to 528 East 79th Street in New York City to see two men named Mr. Ayala and Luis Cardona. (TR 182-187).

After Mr. Guerrero waited at Borough Hall without incident and made several unsuccessful telephone calls, he proceeded to 528 East 79th Street accompanied by several agents and equipped with a Kel set. The defendant, Carlos Munoz, answered the door at that location. Mr. Guerrero asked Mr. Munoz if he were "Ayala" and Mr. Munoz said "no". (TR 187-188). Mr. Guerrero then told Mr. Munoz that he was bringing something from Columbia for Mr. Ayala. Mr. Munoz said that he worked for Mr. Ayala who was not home and asked Mr. Guerrero what he was bringing. Mr. Guerrero said that Mr. Ayala knows what he was

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* TR - Transcript of the trial minutes.

(1) 429-0585 was registered to Edwardo Alaya, 60-51 Van Kleck Street, Elmhurst, New York (TR 375).

bringing since it was explained in a letter. Mr. Munoz said that Mr. Ayala has a "substitute" named Luis and he told Mr. Guerrero to return in one hour. (TR 192-199).

Mr. Guerrero returned to that address an hour later and met the defendants Luis Cardenas, Carlos Munoz, Marin Gonzalo and Hector Jaramillo.[2] Mr. Cardenas told Messrs. Munoz, Gonzalo and Jaramillo to walk ahead and then had a conversation with Mr. Guerrero. (TR 201-203). Mr. Munoz did not participate in that conversation (TR 229). After the conversation, Mr. Guerrero left the building with Messrs. Cardenas, Gonzalo and Jaramillo and proceeded to a car where the delivery of cocaine was made to Cardenas. Mr. Munoz was not present when the cocaine was delivered. (TR 205-212). Mr. Munoz returned to the building when the other individuals went to the car where they were arrested after the delivery of cocaine. (TR 309-314).

Mr. Guerrero's testimony was corroborated by the testimony of several surveilance agents as well as by the transcripts of the tapes made from the recordings through the Kel set.

On cross examination, Mr. Guerrero admitted that he had never met Mr. Munoz prior to February 10, 1976 and that his name was never mentioned by the people he was dealing with in Columbia. He further testified that he never told Mr. Munoz that he was delivering cocaine and there was no mention of the

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(2) Marin Gonzalo and Hector Jaramillo were tried and acquitted by the same jury that convicted the appellants herein.

word cocaine in any of the transcripts taken from the Kel set. (TR 212-223).

QUESTIONS PRESENTED

1. Whether the defendant Munoz was entitled to a judgment of acquittal?

2. Whether the court's charge or its failure to charge as requested was error?

ARGUMENT

POINT I

THE DEFENDANT MUNOZ WAS ENTITLED TO A JUDGMENT OF ACQUITTAL

At the end of the governments case and again at the conclusion of all the evidence, the defendant Munoz moved for a judgment of acquittal (TR 363 and 377). We submit that the court erred in denying that motion.

We contend that in considering the evidence in the light most favorable to the government, there was insufficient evidence from which the jury could reasonably find that Mr. Munoz was guilty beyond a reasonable doubt.

At best, the facts permit inferences which are equally consistent with innocence as with guilt.

The fact that Mr. Munoz was present at the apartment Mr. Guerrero was instructed to deliver cocaine to, is not inconsistent with innocence since Mr. Guerrero was instructed to deliver the cocaine to either Luis Cardona or Mr. Ayala rather than Mr. Munoz. The conversation at the apartment is not incriminating since the word cocaine was never used and the language used is susceptible of numerous interpretations other than guilt. The fact that Mr. Munoz apparently notified Mr. Cardenas of Mr. Guerrero's visit is not conclusive evidence that Mr. Munoz knew that the purpose of the visit was to deliver cocaine. Moreover, the fact that Mr. Munoz was not present when the cocaine was delivered is evidence only that either the defendant had no knowledge of the conspiracy or that even if he had knowledge, that he was not a participant.

The following cases seem to be directly on point. In Roberts v. United States, 416 F2d 1216 (5 Cir. 1969), the government proved that a defendant, Barbara Bookout, associated with conspirators after she knew that they were involved in a conspiracy to possess and distribute counterfeit money. In addition the evidence showed that she destroyed some of the counterfeit money. There the court held that mere knowledge

of the conspiracy and association thereafter with the conspirators was insufficient to support a guilty verdict. The issue the court noted was whether her destruction of the money was sufficient to support a guilty verdict. The court concluded that it was not since that evidence was susceptible of two possible hypothesis; the first was that she destroyed the counterfeit money to prevent discovery in which event she would have been proven to be a knowing member of the conspiracy. The second hypothesis, however, was that she did it merely to help a friend who was a conspirator. In that event, the court reasoned that the jury could not find her guilty. Since either of these hypothesis was equally possible, the court said, a verdict of acquittal should have been granted by the trial judge.

In United States v. Ramirez, 441 F2d 950 (5 Cir. 1971), the evidence disclosed that on the day of the heroin sale, Mrs. Hernandez entered a bedroom while the drug was being measured, conversed with the co-defendant Ramirez in Spanish, picked up $1,000 and left the room. When persons looking to buy the heroin telephoned and asked for Ramirez, Mrs. Hernandez summoned him to the telephone.

There the court held that Mrs. Hernandez was entitled to a judgment of acquittal. The court reasoned that although a jury could reasonably infer from the evidence that Mrs.

Hernandez was an active participant in the heroin business, they could not do so to the exclusion of every other reasonable hypothesis. The court said there was no evidence that Mrs. Hernandez knew that the substance she saw was heroin or that the person who telephoned ever revealed the nature of his call to Ramirez.

Under the facts herein, Munoz's actions could lead a reasonable man to three different hypothesis. First, that he was a knowing participant in the conspiracy. Second, that he knew of the conspiracy, furthered the object thereof by notifying Luis Cardenas of the arrival of Mr. Guerrero, but that he was not a member of the conspiracy. Third, that he was an innocent bystander who unknowingly furthered some object of the conspiracy. Accordingly, since each of the alternatives are equally possible and since only the first could support a guilty verdict, the court should have granted Mr. Munoz's motion for a judgment of acquittal.

POINT II

THE COURT'S CHARGE AND ITS REFUSAL TO CHARGE AS REQUESTED WAS REVERSIBLE ERROR.

The defendant Munoz's defense was based upon the contention that he was merely an innocent bystander who may or

may not have had knowledge of the conspiracy. In light of that defense, the defendant Munoz requested the court to charge that "neither association with conspiracy nor knowledge of an illegal activity constitutes proof of participation in the conspiracy". The court answered that request by stating:

> "Well, I've got other words to that effect in my general conspiracy charge." (TR 460)

On the issue of knowledge of the conspiracy and association with the conspirators, the court charged the jury as follows. That the last essential element which the government must prove beyond a reasonable doubt is

> "That the accused was willingly and knowingly a member of the conspiracy with intent to further one of its objectives." (TR 475)
>
> "Mere similarity of conduct amongst various persons and the fact they may have associated with one another and seen together and discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy. Mere association in and of itself may be the inference of guilt of conspiracy." (TR 475-476)
>
> "The extent of any defendant's participation, moreover, is not determinative of his guilt or innocence. A defendant may be convicted as a conspirator even though he may have played only a minor role in the conspiracy." (TR 478)

> "One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. On the other hand, a person who has knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Before the jury may find one or more or all of the defendants or any other person has become a member of the conspiracy. the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed, and that the particular defendant or other persons whose claim to have been a member, wilfully participated in the unlawful plan with the intent to advance or further some object of the conspiracy." (TR 478-479)

At the end of the court's charge, the defendant Munoz again requested that the court charge that:

> "Mere knowledge of the existence of a conspiracy or mere association with the conspiracy...

The court interupted stating:

> "I so charged." (TR 501)

We submit that the court's refusal to charge that mere knowledge of the existence of the conspiracy was error. We further submit that the court's charge on mere association with the conspirators was error.

To support our first contention we rely upon Robert v. United States, 416 F2d 1212 (5 Cir. 1969) where the court stated:

> "It is elementary that neither association with conspirators nor knowledge of illegal

activity constitutes proof of participation in a conspiracy, United States v. Falcone, 311 U.S. 205".

The court charged on association with conspirators that:

> "Mere similarity of conduct amongst various persons and the fact they may have associated with one another and seen together and discussed common aims and interest does not necessarily establish proof of the existence of a conspiracy. Mere association in and of itself may be the inference of guilt of conspiracy". (TR 475-476)

While we recognize that the first sentence of the quoted charge was proper and would have satisfied the defendant's request, see Nipp v. United States, 422 F2d 509 (9 Cir. 1970), we submit that the last sentence which we have underlined constitutes reversible error. See United States v. Armone, 363 F2d 385,403 (2 Cir. 1966); United States v. Kompinski, 373 F2d 429, 434 (2 Cir. 1967).

POINT III

WHEREVER APPLICABLE THE APPELLANT MUNOZ JOINS IN THE ARGUMENTS RAISED BY APPELLANT CARDENAS

Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, the appellant Munoz adopts, to the extent it is

applicable, the arguments raised by the appellant Cardenas.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed or a new trial ordered.

Respectfully submitted,

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COURT OF APPEALS
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UNITED STATES OF AMERICA,
Appellee,

- against -

MUNOZ,
Appellant.

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Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF **NEW YORK** *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York
That on the **16th** *day of* **July** *19* **76** *at* **225 Cadman Plaza, Brooklyn, New York**

deponent served the annexed **Brief** *upon*

David Trager U.S. Attorney- Eastern District
the **Attorney** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this **16th**
day of **JUly** *19* **76**

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Victor Ortega

VICTOR ORTEGA